ARGUMENT

OF

GEORGE T. CURTIS, ESQ.,

IN THE CASE OF DRED SCOTT, PLAINTIFF IN ERROR, *vs.* JOHN F. A. SANDFORD.

DELIVERED IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER 18, 1856.

[DRED SCOTT, the plaintiff in error, instituted an action of trespass in the Circuit Court of the United States for the District of Missouri, describing himself as a citizen of the State of Missouri, against John F. A. Sandford, described as a citizen of the State of New York, for imprisoning himself, (Dred,) his wife Harriet, and his two children, Eliza and Lizzy, as slaves, the action being what is commonly called a suit for freedom. The defendant filed a plea to the jurisdiction of the Court, alleging that the plaintiff is not a "citizen" of Missouri, because he is a negro of African descent, his ancestors being of pure African blood, brought into this country and sold as slaves. The plaintiff demurred to

this plea, and the Circuit Court sustained his demurrer, thereby deciding him to be a "citizen," and ordered the defendant to plead over. The defendant then pleaded over, justifying the alleged trespass on the ground that the persons named in the writ were his slaves; and, after issue joined upon these pleas, the parties agreed upon the following statement of facts:—

In 1834, Dred Scott was a negro slave, belonging to Dr. Emerson, a surgeon in the army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until 1836. Dr. Emerson then removed the plaintiff to the military post at Fort Snelling, in the territory of the United States north of 36° 30′, and north of the State of Missouri, where he held the plaintiff as a slave until 1838.

In 1835, Harriet, who was the negro slave of Major Taliaferro, an officer of the army, was taken by her master to Fort Snelling, where she was held as a slave until 1836, when she was sold to Dr. Emerson, who held her as a slave at Fort Snelling, until 1838. In 1836, the plaintiff and Harriet, with the consent of Dr. Emerson, intermarried at Fort Snelling. Eliza and Lizzy are children of that marriage. Eliza was born on board a steamboat, on the river Mississippi, north of the north line of the State of Missouri; Lizzy was born in the State of Missouri, at Jefferson Barracks, a military post. In 1838, Dr. Emerson removed the plaintiff and his wife and children to the State of Missouri, where they have ever since resided. Before the commencement of this suit, Dr. Emerson sold the plaintiff and his wife and children to the defendant, Sandford, who has ever since claimed to hold them as slaves.

Upon these facts the jury, under the instructions of the Court, returned a verdict for the defendant. The plaintiff then sued out a writ of error to the Supreme Court of the United States. The cause was argued at the December

term, 1855, and was then ordered by the Court to be reargued at the present term upon the following questions : —

1. Whether, after the plaintiff had demurred to the defendant's first plea to the jurisdiction of the court below, and the court had given judgment on that demurrer in favor of the plaintiff, and had ordered the defendant to answer over, and the defendant had submitted to that judgment and pleaded over to the merits, the appellate court can take notice of the facts admitted on the record by the demurrer, which were pleaded in bar of the jurisdiction of the court below, so as to decide whether that court had jurisdiction to hear and determine the cause?

2. Whether or not, assuming that the appellate court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri within the meaning of the 11th section of the Judiciary Act of 1789?

The latter question involved, among others, the inquiry whether the condition of the plaintiff was changed from slavery to freedom by residence in the territory subject to the operation of the restriction contained in the Act of Congress of 1820, commonly called the Missouri Compromise Act. This drew into the case the constitutionality of that act.

Mr. CURTIS was retained in the cause, after it was opened by Mr. BLAIR for the plaintiff in error, for the purpose of assisting in the argument of this question on behalf of the plaintiff in error, and the following argument was made by him in reply, after the counsel for the defendant in error had closed, and after Mr. Blair had also replied.]

MAY IT PLEASE YOUR HONORS : — In rising to speak to the single question on which I am to address the Court in this cause, I may naturally give utterance to the reflection, that with the political relations of this subject of the power of Congress over the Territories we here have nothing to do. Whether the power to legis-

late on the domestic and social relations of life in a Territory, if it exists, ought to be exercised; whether it ought to be conferred in its plenitude on the people of the Territory or held in the hands of Congress; whether it ought to be used for one purpose or thrown into abeyance for another; whether it ought to be employed for or against the supposed interests or wishes of one class of States as distinguished from another class, — are matters that will never aid anybody in determining whether the power is to be found in the Constitution. This question, with whatever aspects it may go elsewhere, with whatever influences or elements it may be elsewhere surrounded, comes into this pure atmosphere of juridical truth to be debated and decided as a proposition of constitutional law, bearing upon the rights of parties to a judicial controversy. Treating it in no other light, approaching it for no purpose beyond the little aid I may give to the Court in the decision of the cause, I profess myself able to consider it as a purely juridical question; for, may it please the Court, I am free to say that if I held the legislative authority of this Government, or any fraction of it, and had satisfied myself, as I am satisfied, of the existence of this power, I would exercise it or refrain from exercising it precisely according to what I believed to be the exigencies of the particular case; and I would prohibit the relation of master and slave, or permit or sanction it, according to the nature of the soil and climate, the character of the present or the probable character of the future settlers, and according to what I might believe to be for the interests of the particular Territory. Acting upon this principle, I should

hope to do something, though that hope might be vain and illusive, to eradicate from the public mind those feelings, which in one part of the country lead to a claim of the power in order that it may be exercised always in one way, and in another part of the country lead to a denial of the power in order that its exercise in any way be prevented.

But I hold no part of the legislative power of this Government, and, by the blessing of Heaven, shall always be free from that responsibility; and I feel no other interest in this question than that which every jurist should feel in the true construction of the fundamental law of his country. As a jurist, I believe that Congress has full power to prohibit the introduction of slavery into the Territories of the United States; as a citizen, I can conceive of cases in which it would be unjust to a portion of the Union to exercise that power, and in which I never would exercise it. And now, in coming to the question on which I am to address the Court, I desire to state to the counsel for the defendant in error (Hon. Reverdy Johnson and Hon. H. S. Geyer) that they will hear no references from me to the Constitution "generally." They have called upon us to point out the provision in the Constitution which gives this power, and not to assert it, and then to support the assertion by citing the Constitution *passim*. Their call shall be answered. I give them notice that my argument will be confined to the 3d section of the 4th article; and, if I do not succeed in satisfying even them that there resides in that section a legislative power over the Territories adequate and competent to all the purposes for which Congress has

ever undertaken to use it, they shall have my free permission to turn their batteries against those who are in the habit of asserting the power and referring in support of it to the Constitution "generally." I do not propose even to debate the question whether a power to legislate on personal rights can be derived, as an independent power, from the right to acquire territory by purchase or conquest. Whatever may be the value of the suggestion which fell from the great Chief Justice of a former day, (C. J. Marshall,) in the case of the American Insurance Company *v.* Canter, in 1 Peters, (and no suggestion ever fell from him that was without value,) it is certain that he and the Court over which he presided, placed the source of the power of Territorial government, for the decision of that case, in the 3d section of the 4th article of the Constitution. I may desire hereafter, if the time shall permit, to consider what is the probable explanation of the language of the Chief Justice in that case, and to state what I understand to be the relations between the right of acquiring territory and the power of governing it. At present what I wish to say is, that as to the source of the power to govern a territory, or to organize it into what we call a Territorial Community, or to legislate upon any of the relations of its inhabitants, whether to this Government or *inter sese*, my argument will be confined to the 3d section of the 4th article.

I wish, in the next place, to say, may it please your Honors, what indeed is obvious to every one, — that this is eminently a historical question. But I shall press that consideration somewhat further than it is generally carried on this subject, and much further

than it has been carried by the counsel for the defendant in error; for I believe it to be true of this, as it is of almost all questions of power arising under the Constitution, that when you have once ascertained the historical facts out of which the particular provision arose, and have placed those facts in their true historical relations, you have gone far towards deciding the whole controversy. So true is it that every power and function of this Government had its origin in some previously existing facts of the national history, or in some then existing state of things, that it is impossible to approach one of these questions as one of mere theory, or to solve it by the aid of any merely speculative reasoning. Hence it is eminently necessary, on all such occasions, to ascertain the history of the subject supposed to be involved in a controverted power of Congress, and, above all, to approach it with the single purpose of drawing that deduction which the constitutional history of the country clearly warrants.

The first proposition that I shall maintain, then, is the following:—

1. That the last clause of the 3d section of article 4 is by no means an independent provision, standing by itself, and to be construed by itself, as both the learned counsel have treated it, but that it was placed there with a purpose; that it is intimately connected with the first clause of the same section, and that it embraces a provision historically necessary to the exercise of the power clearly and unequivocally granted in the first clause. The whole section is as follows:—

"SEC. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the juris-

diction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

Now, if there is any thing certain with respect to the Constitution, it is that these two subjects are not placed there by an accidental coincidence. They are not there in the mere accident of juxtaposition. They were placed there with a purpose, which it is my duty now to show. Not to stand here and relate notorious facts, but in the briefest possible order in which I can place them, I desire to refer to those great historical events which surround the origin of these provisions.

We know, then, that the vast domains included within the indefinite and unsettled boundaries of some of the larger States formed the chief and almost the only subject of contention between the States of this Union after the Declaration of Independence and during the progress of the Revolutionary war. We know that no sooner was the Union cemented by the magnificent cession made by Virginia — "mother of great men," she has been called; doer of great deeds she might be called — no sooner had Virginia ceded to the United States the country north-west of the Ohio, than the question arose how that country was to be formed into States and those States admitted into the Union. This question was of necessity precipitated upon the Union by the deed of cession itself; for that deed — and I beg our learned opponents to note the fact — contained an express con-

dition that the country ceded should be formed into distinct republican States, and that those States should be admitted into the Union; so that the United States, from the moment when they received that deed, stood as trustees to execute these great purposes. Moreover, it will be found that, in order to enable the United States fully and completely to effect the purposes of the grant, Virginia ceded all her "right, title, and claim, as well of *soil* as of *jurisdiction*, which the said Commonwealth hath to the *territory* or tract of country within the lines of the Virginia charter, situate, lying, and being to the north-west of the river Ohio, to and for *the uses and purposes* and *on the conditions* of the said recited act." The recited act was the act of Assembly passed by Virginia authorizing the conveyance, and declaring the trusts and conditions on which it was to be made. (Journals of the Old Congress, IX. 67–69; XI. 139, 140.) The deed was executed on the 1st day of March, 1784. Mr. Jefferson immediately undertook a measure (in Congress) to provide for the formation of States in the territory, and for their future admission into the Union. But the power of Congress to admit a new State, so originating and so formed, was nowhere to be found in the articles of confederation. Mr. Jefferson's resolves contained a prohibition against slavery in the territory, that was to operate *after the year* 1800; but this clause was stricken out. The resolves, however, were passed, providing for the formation and admission of States. But Mr. Jefferson has himself informed us, that there were great differences of opinion in Congress, as to the power to admit a new State formed in the territory; and that, although his measure was adopted,

the delegations of most of the States reserved themselves on the question of power to admit a State, and on the rule of voting.*

We leave the year 1784 with these facts, and come down to the year 1787. In the interval, encouraged by Mr. Jefferson's measure, a great emigration had begun to take place across the Ohio, chiefly from the Northern and Eastern States. The direction of this emigration after it entered the Territory, its wants, and the surface and shape of the country, rendered Mr. Jefferson's measure inadequate to the purposes it embraced, and the ordinance of 1787 was prepared and brought into Congress to take its place. It has been correctly said, on the other side, that the ordinance embraced two distinct classes of provisions. One branch of it contained legislation for the establishment of States and their admission into the Union; the other contained legislation on the rights and capacities of persons, not only upon this subject of slavery, but upon many other subjects. Of course the power of Congress to legislate on any of these interests was no greater in 1787 than it was in 1784.

We have arrived, then, at the summer of 1787 with these facts — the *exercise* of a plenary power of legislation by Congress over the Territory, and a complete *want* of such power of any express character, or resting on any express provision. Now, I place very little value upon the mere fact that the ordinance, as passed by the Congress of 1787, contained a prohibition against slavery. In my humble judgment this fact, in the argument that is to prove the power of Congress

* See Appendix.

under the Constitution, is not worth the ink that it takes to write it down; for, whether the fact is used to establish a supposed policy of the founders of this Government, or as proof of their views, and feelings, and purposes with regard to this institution, it is undeniable that the Congress which passed that ordinance had no express, reliable, or ascertainable authority to legislate on any of the subjects embraced in it. No; the corner-stone of the whole argument is the want of power in that Congress; and he who wanders away from this into the region of private correspondence and individual declarations of feeling or opinion about slavery, and its destinies and duration, seems to me to desert the foundation of his case, and to do all he can to weaken his position. I believe the truth to have been, in point of fact, that the States in Congress, in 1787, legislated as they did respecting slavery in the North-western Territory because they saw that the region was likely to be occupied chiefly by those who were unaccustomed to the use of slaves, who would not wish for or require them, and would not desire their presence among them; and, seeing this, the delegations of all the States in that Congress were willing that the predominating wishes and interests of the great body of the probable settlers might be consulted and secured. And I am the more confirmed in this view by the fact that when other territories came to be organized south of the Ohio, after the adoption of the Constitution, Congress, seeing that they must naturally be occupied by those who from custom and interest would desire this species of labor, undoubtedly sanctioned and authorized the institution. (See the acts

organizing the Territories of Tennessee, Mississippi, and Orleans, referred to *infra*.)

But we must take along with us constantly in the investigation of this subject, that the power of the Congress of 1787, as undertaken to be exercised in the ordinance, was strenuously denied. Mr. Madison emphatically denied it in the 38th number of the Federalist, quoted by my friend on the other side, (Mr. Johnson). Indeed, it is impossible to examine the articles of confederation, and not to see that the Congress had no authority to admit a new State formed out of territory not belonging to the United States at the time those articles were framed.

Quitting the city of New York, where that Congress sat, and coming to the city of Philadelphia, where the Convention was at the same time engaged in framing the Constitution, the next historical fact is, that it was known to the Convention that the Congress had passed the ordinance. Most persons have contented themselves, in investigating this subject, with saying that this knowledge must be *presumed*. May it please your Honors, it does not rest upon a presumption. A copy of the ordinance, which was passed July 13, was communicated by R. H. Lee to Gen. Washington, the President of the Convention, by letter dated July 15. (Correspondence of the American Revolution, vol. 4, p. 174. Writings of Washington, vol. 9, p. 261.) The ordinance was published also in a Philadelphia newspaper on the 25th of July, probably by Gen. Washington's direction.

Here, then, are the facts that the Congress had passed this ordinance, that they had no proper consti-

tutional authority to pass it, and both these things were known to the Convention. At that very moment the Convention was engaged in framing provisions to supply this defect of constitutional power. To their proceedings on this subject I now invite the attention of the Court.

Among the resolutions brought into the Convention on the third day of its session (May 29), by Edmund Randolph, and which contained nearly all the germs of the Constitution, your Honors will find the tenth in these words: —

"10. *Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

This resolution, in every form in which a proposition can be subjected to the action of a deliberative body, passed the Convention; and, finally, on the 27th of July, is found among the resolutions sent to the Committee of Detail for the preparation of a draft of the Constitution, where it takes its place as the seventeenth resolution, in identically the same words. The Convention, therefore, had arrived at this solemn decision, that the new Government was to have power to admit into the Union two classes of States: one, those which should "arise" out of a voluntary junction of the government and territory of parts of the existing States; the other, those which should arise "otherwise." Now, what was the actual state of affairs in reference to which this language was used? On the North, Vermont, in the somewhat rebellious attitude of an over-

grown boy, was in the actual exercise of an independent jurisdiction adversely to the State of New York. On the South-west, Kentucky, of whose matured sovereignty we are reminded by the benignant presence of my venerable friend, her Senator, (Mr. Crittenden,) was then just ready, in her stalwart youth, to be separated from her parent, Virginia. Tennessee was almost beginning to ask permission to exchange the tutelage of her mother, North Carolina, for the guardianship of the United States. In the North-west, the emigration of which I have spoken had already begun to lay the foundations of that infant society which has since expanded into five princely and powerful States. To meet this condition of things power was wanted for the new Government of a double character. In the first place, power was wanted to "admit" all of these anticipated and new States, whether arising out of the old States or arising within the territory. But as to the new States that might be formed out of a part or parts of the old States, no power was needed to form them or to determine when they had "lawfully arisen;" for that was the affair of the old States, to which as settlements they then belonged. But within the reputed or asserted boundaries of those old States, and beyond and around the actual settlements, there were unoccupied lands, claimed, on the one hand, by the United States under the treaty of peace, and on the other by the States themselves as successors of the Crown of England under the Revolution. Power was needed, therefore, to deal with, assert, and dispose of the interest which the United States then had or might afterwards acquire from the States in these lands.

With respect to the new States that were to "arise" in the territory north-west of the Ohio, besides the powers I have now described, there was needed a further and a distinct power, namely, the power to execute the purposes embraced in the cession of Virginia. It is true that the United States, before that cession, had claimed title to that country as well as Virginia; but having invited and received a cession of the Virginia claim, under an express and solemn undertaking with Virginia to form the country into distinct republican States and to admit those States into the Union, the United States must be taken to have waived their own original title, and to have held the country subject to the conditions and trusts declared in the deed of Virginia, or at least to have subjected their own independent title to the provisions and conditions of that deed. This view of the subject is confirmed by the fact that when, in 1786, it became expedient to vary the number and form of the new States contemplated by the original plan embraced in the cession and in the resolves of Congress, it was deemed necessary to obtain the consent of Virginia, which was given. (Journals of Cong., XI. 139, 140, July 9, 1786.) Power was wanted, therefore — legislative power — to superintend the formation of States in the territory; to lay the foundations of society; to protect its growth; to give it law, order, security; to lead it on from the first crude condition of a dozen log-cabins to that grand system of human association and self-sustaining authority that constitutes a State; and when all was done, and the whole of the vast region should be filled as it is now filled, to be able, with grateful and patriotic

hearts, to turn to generous and magnanimous Virginia and say to her, "Behold what YOU have enabled us to do."

These were the objects to be accomplished, and the framers of the Constitution addressed themselves to their work. Their Committee of Detail, in the first draft of the Constitution which they reported, made no provision on this subject, except to declare that "new States, lawfully constituted or established within the limits of the United States, may be admitted by the Legislature into this Government" by a vote of two thirds of each House; that "if a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission;" that "if the admission be consented to, the new States shall be admitted on the same terms with the original States, but the Legislature may make conditions with the new States concerning the public debt which shall be then subsisting." (First draft of the Constitution, Art. xvii., Elliot's Debates, v. 381.) These provisions embraced neither a power to dispose of the public lands, nor that legislative power which I have described as necessary to the formation of new States in the territory. Mr. Madison, with the instant sagacity that always characterized him, saw the omission and proceeded to supply the defect. He moved two propositions as additional powers of Congress: —

"To dispose of the unappropriated lands of the United States;

"To institute temporary governments for new States arising therein."

These propositions were referred to the Committee of Detail; but, before they had reported upon them, the seventeenth article of their draft of the Constitution was reached and taken up for consideration. Thereupon various objects, which different classes of the States desired to accomplish, were at once developed. On the one side were those who sought for restrictions to prevent the dismemberment of any of the old States without their consent. This provision was made. Then came the subject of the vacant lands lying within the asserted boundaries of some of the old States and claimed by the United States under the treaty of peace; and the question was, in what attitude the Constitution was to leave the claims of the United States and the claims of the individual States? At this precise point, Gouverneur Morris — surveying the whole field, aiming to comprehend the political jurisdiction needed for the territory north-west of the Ohio, the power to dispose of the lands of the United States wherever situated, and at the same time to leave the titles to unoccupied lands claimed both by the United States and by individual States without prejudice from any thing in the Constitution — rose and presented the very clause that now constitutes the last branch of the third section of the fourth article, in these words: —

"The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular State." — (Elliot, v. 492–497.)

This proposition was at once adopted with almost universal consent. It satisfied everybody, and accomplished all that had been suggested, and which ought to have been accomplished. It was one of those fortunate achievements of the pen by which a man of great experience and legislative tact, sitting as if in the centre of men's minds, and combining their thoughts and purposes into a single sentence, engraves the needed provision upon the record by a single stroke, and leaves it to do its office through all coming time.

Having now established, as I respectfully submit I have, the connection between the two clauses of the third section, I proceed to state the second proposition that I am to maintain in this argument: —

2. That the power to "make all needful rules and regulations respecting the territory" is a power to legislate — plenary; embracing all the subjects of legislation of which any full legislative power can take cognizance, subject only to the restrictions which qualify all the legislative powers of Congress, wherever exercised, with respect to certain great public and private rights.

I admit and claim that the power of territorial legislation is subject to these restrictions, which I shall presently enumerate; and I do so because my learned friend (Mr. Johnson) expended a vast force of denunciation upon the idea that citizens of the United States, by quitting a State and going into a Territory, may pass out of the pale of the Constitution and within the pale of an enormous, unlimited, and irresponsible power, and so subject themselves to an "inequality." Now,

that a citizen of a State, when he emigrates into a Territory, lays down the character of a citizen of the State from which he removes, so far as the rights and privileges secured to him by the Constitution *as a citizen of a State* are concerned, I believe to be entirely true. For example, he cannot sue a citizen of another State in the courts of the United States, *by reason of his citizenship*, after he has become an inhabitant of a Territory. But let us see whether it be true that he subjects himself to an arbitrary and unlimited power of legislation and government. In the Constitution, as originally adopted, there are certain very important limitations imposed upon *all* the legislative powers of Congress, wherever they may be exercised, and in the amendments there are many more. The provisions of the Constitution respecting the habeas corpus, bills of attainder and ex-post facto laws, titles of nobility, the definition, evidence, and punishment of treason, and religious tests for office, are positive restrictions, which Congress can violate *nowhere*. I hold the same to be true with respect to trial by jury for crime. With respect to the rights secured by the amendments, it is clear that Congress can make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; that no soldier can in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law; that unreasonable searches and seizures are prohibited, and that warrants must issue upon probable cause, supported by

oath, &c.; that for capital or otherwise infamous crimes, there must be a presentment by a grand-jury; that no man can be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; and that private property cannot be taken for public use without just compensation; that in suits at common law, exceeding twenty dollars in value, there must be a trial by jury; that excessive bail cannot be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. All these are restrictions upon all the legislative powers of Congress, and it would be idle to contend that they apply only to those powers when exercised in the States. I do not say that they would be applicable to a district of country conquered from an enemy, while it remained in our military occupation, or to a place purchased for a military or naval station without the limits of the Union. I am treating now of "*the* territory" contemplated and intended in the third section of the fourth article, in respect to which I have shown that the framers of the Constitution intended to provide a legislative power; and I say that if there is any legislative power whatever provided in the authority to "make all needful rules and regulations," it is, like all the other legislative powers, subject to these restrictions, which declare that certain things shall not be done, and that certain other things shall be done.

But to return to the power itself. I submit to your Honors that, considering the object for which it was to be created, and the relations between the United States and Virginia under the deed of cession, it was, *a priori*, to have been expected that the Convention would

create such a power as I have described. What was the object for which the power was to be given? To prepare, in a new and unoccupied country, "States" for admission into this Union. What is a State? Is it an aggregation of men living without law? No; it is a political society founded in social order; and for that order it must be trained. Before the particular form of the body politic, called in our system a "State," is formed, there must be an interval. That interval must be occupied with the restraints and protections of law. In other words there must be government; which is only saying that there must be legislative power. Where shall that legislative power reside? By the law of nature it is in the individuals settling on the soil of the territory. But the framers of the Constitution were not legislating to enact the law of nature, or to carry it out; but to provide a positive code of political law that should *vest* somewhere this legislative power necessary to the wants of a new society. They said, therefore, this power of legislation shall not reside where the law of nature would leave it, but in the Congress of the United States. *They* shall have power to make all the needful rules and regulations required to accomplish the work that is to be done: first, because there is to be an interval during which there must be authority somewhere; secondly, because there is cast upon the United States, by the cession of Virginia, the trust of superintending the formation of that region into States; and, thirdly, because to admit the law of nature to operate would be to surrender the whole control, municipal government, corporation, private rights, political relations, every thing out of the hands of the

United States, who are the trustees under the cession, into the hands of those who are *not* the trustees. I say, therefore, there were reasons, *a priori*, for this provision; and this brings me to the phraseology of the clause.

We have had much criticism by both of the learned counsel for the defendant in error upon the meaning of the word "territory" in this clause of the Constitution. It is insisted that it means *land*, and nothing else. If this be so, the consequence seems to follow, as in one part of their arguments they have contended, that the power or powers granted in the section extend to nothing but the disposal of the soil. How the learned counsel in that case get the right to establish municipal government or a "municipal corporation," which they distinctly admit in their brief, they have not informed us. But I think that the history of the formation of this clause opens to us the source of municipal and political government, as well as of the power to dispose of the soil. The primary and general sense in which the framers of the Constitution used the term "the territory" was that in which it was used in the deed of cession, and in which it had always been used since the cession. They meant by it the region of country ceded by Virginia to the United States, and they spoke of it as "*the* territory." The United States had no other territory; they did not then expect to have any other, except such as might be ceded to them by other States under similar circumstances and for similar purposes. Now, that the framers of the Constitution intended to use this term in the clause before us (using it but once) in a sense which admits of its application to the *soil*, is manifest from the context. The rule, *reddendi singula*

singulis, refers the term "territory" to the power to "dispose of," and gives it the signification of land. In that construction the subject qualifies the power and the power qualifies the subject. The same rule refers the term "territory" to the power to "make all needful rules and regulations respecting" it, and gives it the signification of the country or region belonging to the United States. These terms embrace a legislative power just as complete, just as efficacious, as if the words "exclusive legislation" had been employed. But if you say that they are a mere repetition, in another form, of the power to "dispose of" the soil, you make them merely tautological; whereas *there are no tautologies to be found in the Constitution of the United States.* It would be a violence of construction unwarranted by any thing else in the instrument to suppose that words of an altogether wider scope and signification were employed as a bare repetition of the idea of *disposing of the soil.*

In this connection I wish to notice an objection taken by the learned counsel (Mr. Geyer) who opened the cause for the defendant in error. He put to us the inquiry, with great significance, how it happens, if these words "to make all needful rules and regulations" were intended to give a legislative power, how it happens that the framers of the Constitution did not employ the terms "exclusive legislation," which they used to establish the authority of Congress over the District of Columbia and over places that might be ceded for forts, arsenals, and dock-yards? I think I can tell him. The framers of the Constitution knew very well that if a seat of government were to be obtained for the United

States, which they did not mean peremptorily to direct, it must be obtained here, somewhere in the centre of the Union, by a *future* cession from a State or States that had always had jurisdiction over the tract that might be ceded. It was necessary, therefore, to employ a term which should, by its immediate operation upon the cession, exclude the possibility of any exercise of State authority after the cession, and fix the authority of Congress as the sole authority by which the ceded tract was to be governed. The same was true of the places that might thereafter be ceded for forts and dock-yards. But, with respect to the territory northwest of the Ohio, there was no such necessity for excluding the possibility of State jurisdiction. The jurisdiction of Virginia, or all her claim and possibility of jurisdiction, had passed to the United States years before the Constitution was framed. There was no necessity, therefore, to give effect and operation to the idea that the jurisdiction of the United States was to be exclusive of any State jurisdiction. But it was necessary, in order to vest in Congress a full legislative power to exercise the jurisdiction of the United States, to use words which would describe such a power; and this was done by the terms "to make all needful rules and regulations."

But our learned opponents think that they find in the terms "or other *property*," which follow immediately after the word "territory," conclusive proof that the latter term meant nothing but *land*. The simple answer to this is, that it was just as proper to follow the word "territory" with the expression "other property," if "territory" mean the region of country whose soil and

jurisdiction had been quitclaimed by Virginia to the United States, as it would have been upon the supposition that "territory" included nothing but the soil; for, whether this term includes more or includes less, every thing that it did include was the *property* of the United States. It is obvious, however, from the history of the clause, that the words "or other property belonging to the United States" were used to extend the powers of disposal and regulation to those other claims which the United States had within the asserted boundaries of other States, or might thereafter have under the cessions of other States besides Virginia.

Having, then, arrived at two results — first, that the clause embraces two separate but connected powers; second, that one of them, which I call the legislative power, was intended to effect a great purpose of national policy in the preparation of new States for admission into the Union — I proceed to inquire whether that purpose can be answered, by treating the power as any thing less than what is described by the words in which it is granted.

And here it is immaterial which branch of the argument the other side may elect to take. They must admit that the words mean something. Take first the establishment of governments within the territory. Congress makes a law having reference to the organization of a territorial government. Somebody refuses to obey it, under the allegation that Congress have exceeded their powers by going beyond the object of the clause; he is prosecuted, and brings his case here by writ of error. Your Honors look into the Constitution, and find that Congress has power to make "*all* needful rules and reg-

ulations respecting the territory," and you tell him that the particular law of which he complains was made respecting the territory in question. But, says the plaintiff in error, this law was not within the power, because it was not "needful" in the exercise of the power to erect a government. Is that a judicial question? Is it a question which your Honors can decide? What means has the judicial department for determining it? And yet, if the doctrine contended for on the other side be correct, your Honors must determine it, either with or without means; for if the power granted in this section be any thing less than a full legislative power — if it is confined to certain specific objects — the question whether the subject of a particular law is within those objects can only be determined by determining whether the particular legislation is "needful."

This illustration shows that the moment you reduce the words below their natural import and say that they are not applicable to this or that particular subject, you bring into this Court as a judicial question one that is not only in its nature a political question, but one that is made political by the very terms of the grant; for if the terms of the grant are made to embrace only a few specific objects — less than *all* the objects of legislative power — then the question whether the particular subject of a law is "needful" for the purposes of the granted power will be identical with the question whether the subject of the law is within the scope of the granted power. But, on the other hand, if the words are held to include all subjects of legislation within the territory, the question whether a particular law is needful cannot become confounded with the question whether its subject is within the granted power.

Let me illustrate my meaning by supposing another case. The gentlemen on the other side claim that the power is limited to the disposal of the land. Very well. Congress pass a law that no land in a particular Territory shall be sold to anybody but a white man. A colored man makes an entry, pays his money, and by some oversight gets his patent. The title descends, gets into dispute, and the case is brought here. Those who claim under the colored man allege that the law was not within the power of Congress, because it was not "needful" to the exercise of the power of selling land; and your Honors must determine whether it was "needful" in order to determine whether it was within the particular and special power alleged to be the only subject of the grant. But let us suppose that Congress has a general legislative power over all subjects within the Territory, and the same case comes here. Your Honors' answer to it will be, "Congress have full authority to legislate about every thing in a Territory that can be the subject of legislation anywhere; and the question of the *needfulness* of their legislation does not determine the extent of their power. If you are aggrieved, there are chambers above and a mansion at the other end of the avenue, to which you must go for relief."

Now, may it please your Honors, is not this reasoning justly applicable to the matter of slavery in a Territory, which nobody will deny to be a subject of legislative regulation, wherever legislative power exists? Let me press the considerations which I have urged, not upon the feelings, but upon the judgment of the bench. Are your Honors to sit here between the contending parties of the Republic, or its extremest factions, the

pro-slavery and the anti-slavery, and, as their successive projects take the form of legislation for Territories, are *you* to determine what is "needful" for the welfare of the country? Is this bar, — sacred to the high debates of jurisprudence and renowned for them throughout the world, — to be turned into an arena for political combatants to discuss questions of social theory, the value, the dignity, the blessing of this or that form of labor, the equality or inequality of races, the claims of sections upon the Territories? And when the wrangle is ended, terminated by your Honors' rule, or worn out by its own ferocity, *you* are to retire, and, by such principles and upon such considerations as you may, *you* are to determine what is "needful" for the public good! The idea is somewhat startling; and yet to this it must come, unless Congress is admitted to be the absolute, supreme, and final judge of what the Constitution has committed to its political discretion. I think, Mr. Chief Justice, when what I have described shall occur, that, speaking for your brethren and yourself, you would be entitled to say, "We sit to administer the *judicial* power. Go to those who can determine such a question, and who are entitled to speak the voice of the people. Our voice is the interpretation of the law; and from that interpretation the Constitution has withdrawn the question of what is a true policy."

But it remains for me, before I leave this part of the subject, to attend to one of the positions taken by the learned counsel (Mr. Geyer) who opened on the other side. "Creating a municipal corporation," he said, "is a different affair from legislating on the rights of indi-

viduals." One of them he admits, the other he denies to be within the power of Congress. Now, in a certain very obvious sense, there may be a great difference between creating a municipal corporation and legislating on the rights of individuals. But the question here is, whether that difference shows that either of them is not within the granted power? Let us examine that question. What constitutes the difference with respect to the power? Both are within the Territory; both are subjects of ordinary legislation; both are equally restrained or unrestrained by the restrictions of the Constitution, according as you hold that those restrictions do or do not extend to the Territories. So far they are alike. Are they not equally alike in reference to the standard by which the Constitution places every law respecting a Territory within the judgment of Congress as to its necessity? The corporation is clearly to be referred to that standard. Whether it shall be made at all; how it shall be made; how and when it shall be changed — all this rests in the judgment of Congress, as to its necessity. Is it any otherwise with regard to the rights of individuals, except so far as they may be fixed by the Constitution itself? What constitutes the distinction? If both corporation and personal rights are within the Territory, if both are subjects on which legislative power can act, if both are unrestrained by any special provision of the Constitution forbidding legislation respecting them, then both are equally to be referred to the standard of what is "needful," and that standard is fixed by the terms of the grant in the judgment of Congress, and nowhere else.

The last proposition which I am to request the Court to examine is, — 3. That the objections which have been here urged to the existence of this power, all resolve themselves into abuses of it, which in no degree touch the question or define the limits of the power itself. One of the principal objections to which we have listened is, that if it is a general legislative power it becomes perpetual. Both the learned counsel have insisted on this in different forms. My friend (Mr. Johnson) who closed the case upon the other side, declared with great emphasis that the power is "not exhausted with the termination of the territorial existence;" and he cited in proof of this the 8th section of the Act of 1820, commonly called the Missouri Compromise, by which Congress undertook to prohibit slavery north of a certain line "for ever." The other counsel (Mr. Geyer) spoke of the power as a power of "dictating the State constitution," and one that would "make white men slaves."

I marvel that two such experienced, able, and distinguished advocates and jurists, did not see two or three very obvious answers to this. In the first place, they might have remembered that the very terms of the grant *limit* the power to the territorial existence. And did they not know that even during the territorial existence there is no potency in the word "forever" that can irrevocably fasten any line of policy upon any Territory? The legislation of the last few years shows plainly enough that there is no magic in that word to prevent its being expunged from the statute-book at any time; as, indeed, it must be, in any legislation, a term of the merest surplusage. I marvel,

also, that the learned counsel did not see that by no exertion of the power in a Territory, however long continued, can any character be impressed upon the State constitution which the people of the State, after they have become such, cannot change in an instant. The learned counsel (Mr. Geyer) referred us to the attempt that was made in Congress, when Missouri first sought admission into the Union, to dictate to her concerning a feature of her constitution. If he referred to the effort made in 1818, 1819, to compel Missouri to form a constitution prohibiting slavery, I say it in his presence, with all the pain that can belong to one generation when speaking of the acts of another, that the attempt was wrong. Congress has no right, when a State asks admission into the Union, to dictate the provisions of its republican constitution; and, had I a vote to give on such an occasion, I know of nothing that would induce me to exclude a new State, whose people, without improper interference and without fraud, appeared to have voluntarily and deliberately chosen to have slaves among them. But the learned counsel should have placed that act of wrong where it belongs, not as an exercise of the power of making rules and regulations for a Territory, but as an exercise of the power to admit a State. Of *that* power it was an abuse. It was neither an abuse nor a use of the power of territorial regulation; and its occurrence in history is no more to be cited as proof that the power of Congress over the Territories is not a full legislative power while the territorial condition continues, than it would have been if it had occurred in the exercise of the power to regulate commerce, or of any other power with which Congress is invested.

As a further proof of the perpetual character of this power, both of the learned counsel have suggested that its exercise, in a certain way, upon certain subjects, may leave upon the structure of society in a Territory consequences that may last for ever, and that this is contrary to the spirit of American liberty. I beg to know if it has not been true of all legislative power since the world began, that it has left upon us some consequences of the manner in which it has been exercised? Have not all the dynasties that have passed over that branch of the race of Adam to which we belong left upon us the impress of their legislation? All that has been done by government, all the former structure of civilization, all past habits of thought and feeling, all that has been made and unmade as law, all that has been permitted and all that has been prohibited, has contributed directly or indirectly to mould the present form and spirit of society. Are we therefore any the less free? What is that political freedom which we value above the rubies and the riches of earth? Is it that we have inherited nothing from the past? Is it the test of freedom to be able to say that the legislative power of a former day has left no traces upon the framework of society? No; the test of freedom is this: that when we have reached the full stature of a State, and have put on the authority of independent self-government, we are at liberty to wipe out all that has come down to us, and to reconstruct society according to the pleasure of our own sovereign minds. As it has been with us, so will it be with the people of every Territory that this Government may organize. You may legislate as you please, you may

construct their social system as you choose, the day will come, when they take their place among the sovereign States of this Union, that they will be absolutely free to undo all your legislation, and to adopt any condition or form of society that is consistent with a republican form of government.

I now beg the attention of the Court for a few brief moments, while I endeavor to state what I understand to be the legislative construction which the Constitution received at the hands of its framers and their contemporaries in respect to this power. I shall not detain the Court long upon the reënactment or confirmation of the ordinance of 1787 by the first Congress that sat under the Constitution. There it stands upon the statute-book, and no man can say that it was not an exercise of legislative power over personal rights and relations in a Territory. But that was an exercise of power to *prohibit* the relation of servitude. I turn from it, therefore, to an exercise of the power to confirm, to sanction, and to perpetuate that relation. On the 2d of April, 1790, Congress accepted a cession of the claim of North Carolina to a certain district of Western territory which has since become the State of Tennessee. One of the conditions of the deed of cession was "*that no* REGULATION *made or to be made by Congress shall tend to emancipate slaves.*" (Statutes at Large, vol. 1, p. 106.)

I pause for a moment upon this remarkable language. The State of North Carolina, assuming that Congress has power to regulate slavery in a Territory, and using the very word which the Constitution employs as synonymous with law, thinks proper to lay

that power under a restriction with respect to the Territory of Tennessee. Congress, by an act passed May 26, 1790, (Stat. at Large, vol. 1, p. 123,) organized a government for the Territory *upon the conditions of the deed of cession.* The learned counsel opposed to us will call this a compact. It is no matter whether it was a compact or something else; it proceeded upon the assumed principle that, without a restriction, Congress would have power to *regulate* the emancipation of slaves. This occurred in the Presidency of Washington, Mr. John Adams being Vice-President, Mr. Jefferson Secretary of State, Mr. Hamilton Secretary of the Treasury, and many of the framers of the Constitution being in Congress.

The next action of Congress to which I wish to refer is that relating to the Territory of Mississippi, organized by statute of April 7, 1798. The 7th section of that act prohibited the importation of slaves into the Territory from any place out of the limits of the United States, leaving, by clear implication, a right to introduce them from places within the United States. The 3d section of the act made this implication perfectly conclusive; for it excluded the operation of the freedom clause in the ordinance of 1787, by an exception which prevented its application to Mississippi. When the bill was pending in the House of Representatives, Mr. Thatcher, of Massachusetts, moved to strike out this exception, upon the ground that the Government of the United States, having itself originated in and been founded on the rights of man, could not consistently establish a subordinate government in which slavery was to be both tolerated and sanctioned by

law. A very instructive debate ensued upon this motion, but it received only twelve votes; and the act was passed containing a clear and unequivocal sanction of slavery by law. (Annals of Congress, 5th Congress, vol. 2, p. 1306–1312.)

Afterwards, in 1804, (March 26,) comes the act to organize the Territory of Orleans. This act contained a prohibition against the introduction of all slaves, "except by citizens of the United States removing into the Territory for actual settlement, and being at the time of such removal *bonâ fide* owners of such slave or slaves; *and every slave imported or brought into the Territory contrary to the provisions of this act shall thereupon be entitled to and receive his or her freedom.*" I know not how there could be a more direct and explicit assertion by Congress, both of a power to emancipate within a Territory and a power to sanction within a Territory, than was here asserted. The whole subject is regulated in both ways, by prohibition and by permission.

Here I think that legislative constructions of the Constitution should cease to be resorted to; for at this point of time we leave the actual presence of its framers and their contemporary generation.

It only remains for me to submit to the consideration of the Court the view which I entertain of the right of acquiring territory, and of the power of governing it when acquired, in order to see whether the territorial clause, as it is sometimes called, is or is not applicable to possessions acquired by conquest or treaty with a foreign power, and, if so, when its application can be said to commence.

It is not probable, so far as I have ever been able to

ascertain, that the framers of the Constitution, or the people of the United States at the time of its adoption, expressly contemplated the acquisition of any territory in addition to that ceded by Virginia north-west of the Ohio, excepting such as might be ceded by some of the other States under similar circumstances and for the same purposes. Although the right to navigate the Mississippi through its outlet to the sea was, for a long time before the Constitution and immediately at that time, a subject of national consideration and of actual negotiation with Spain, it does not appear, so far as I know, that the people of the United States then contemplated the acquisition of the country lying at the mouth of the river, or that they looked to the acquisition of any other foreign territory. The framers of the Constitution, therefore, shaped the territorial clause (art. 4, § 3) with reference to the special object of the formation and admission of new States to be formed out of the territory already within the limits of the United States, and already ceded by one of the States of the Union; but at the same time they made it a general provision by extending it to "other property belonging to the United States;" for these words, as I conceive, considering their context and the objects at which the framers of the instrument were aiming, must be construed to mean other *territorial* property besides that intended to be described as "*the* territory," which meant the particular region north-west of the Ohio.

But, on the other hand, we are to remember that this Government possesses the great national and international powers of making war and of making treaties. It is the settled doctrine of this Court that these powers

involve the power of acquiring territory, either by conquest or by treaty; and upon this ground of right acquisitions have been made by treaty which have been incorporated into the Union. To determine the extent and kind of authority which this Government may exercise over a conquered country, we must look to the law of nations. Having the power of making a conquest, this Government has all the powers over the conquered country that are possessed by any nation when it has made a conquest. It may be governed according to the pleasure of the conqueror, which pleasure is limited, if at all, only by the usages of civilized nations in like cases. With respect to a country acquired by treaty, if the treaty contains any stipulations concerning the treatment of the inhabitants, the power of the nation receiving the cession is limited by those stipulations. If the treaty is silent, the power is the same as in the case of a conquest, and its nature and limits are to be determined by the law of nations. The power to acquire, in both forms, is derived to the Government of the United States from the Constitution. The right to govern after the acquisition is made is derived from and regulated by the law of nations, and it is what Chief Justice Marshall described as "the inevitable consequence of the right to acquire." (1 Peters, 543.)

From these positions it seems necessarily to follow, that, when the United States make an acquisition by conquest or by treaty, (if the treaty contains no stipulations that limit their power,) they may hold and govern the country acquired in any manner, and for any length of time in any manner, that they may see

fit, so long as they choose to keep it in the position of a dependency external to the Union. They may give it a military government or a civil government, or no government other than the arbitrary will of a proconsul; and this power continues indefinitely until Congress shall determine that the country shall be incorporated into the Union. When that time arrives — and its arrival is in the uncontrollable judgment of Congress, in the absence of treaty stipulations — I submit that a change takes place with respect to the source of the power to govern and regulate.

The American Union is a peculiar incorporation of States and the people of States into a General Government. Into this Union no community of people, however previously existing, can be admitted save in a peculiar form, known in our polity as a "State." It must have prepared a republican form of government, adapted to the Constitution of the United States. When, therefore, Congress has decided that the people of such a country shall have the privilege of erecting or forming themselves into a "State," the power to govern them under the war or treaty power ceases, for this manifest reason — that the continued exercise of a power which is arbitrary and despotic in its nature is inconsistent with the condition of society necessary to the successful formation of the institutions which are to constitute what we call a "State." But before the "State" is formed there must be an interval, and during that interval the authority of the United States must, in some form and from some source of power, continue to be exercised. The form and the source of power here applicable are to be found in the territorial clause.

If I have rightly stated the history and construction of that clause, it was framed for the purpose of providing a legislative power, by which Congress can govern a Territory while it is in the process of being formed into a State, preparatory to its admission into the Union. There is, undoubtedly, a *hiatus* in the text of the Constitution, inasmuch as there are no express words which in terms establish a connection between the two clauses of the section. But the history of both the clauses conclusively establishes this connection, and shows the purpose of the last one. The nature of the authority which is provided in this territorial clause is clearly distinguishable from the authority that results as an "inevitable consequence" from the acquisition by conquest or by treaty. It is a legislative authority; it must be exercised in the forms of law, by rule, by regulation. The legislation, moreover, must be such as, in the judgment of Congress, is "needful;" that is to say, the authority which is to be exercised is not to be arbitrary, not to be capricious, and not to be exerted by the will of the Executive under the war power or the treaty power; but it is to be exercised through the judgment of Congress as the legislative department, and by such provisions of law as that department shall determine to be "needful." Concerning the fitness of such a power, and the propriety of applying it to the condition of things existing after it has been decided that a community external to the Union shall be formed into a "State," there cannot be two opinions.

I have submitted these views for the purpose of asking the Court to consider whether they do not reconcile the language used by Chief Justice Marshall in the

case of *The American Insurance Company* v. *Canter*, and whether they do not show that the alleged uncertainty in his mind concerning the source of the power of territorial government had in truth no real existence. But I am trespassing upon time that belongs to other suitors, and detaining the Court. I connected myself with this cause solely from an impulse of duty, or what seemed to me a duty, in the peculiar position in which the counsel for the plaintiff in error (Mr. Blair) stated himself in his opening to have been placed, by circumstances which had made it impracticable for him to obtain assistance in the argument of his case. Having discharged that duty in a necessarily imperfect manner, I now commit the cause to the Court.

APPENDIX.

Extract from a paper furnished by Mr. Jefferson in answer to questions addressed to him by one of the authors of the Encyclopedie Methodique, in 1786 *or* 1787.

"The 11th Article of Confederation admits Canada to accede to the Confederation at its own will, but adds, 'no other colony shall be admitted to the same, unless such admission be agreed to by nine States.' When the plan of April, 1784, for establishing new States was on the carpet, the committee who framed the report of that plan had inserted this clause: 'Provided nine States agree to such admission, according to the reservation of the 11th of the Articles of Confederation.' It was objected, 1. That the words of the Confederation, 'no other colony,' could refer only to the residuary possessions of Great Britain, as the two Floridas, Nova Scotia, &c., not being already parts of the Union; that the law for 'admitting' a new member into the Union, could not be applied to a Territory which was already in the Union, as making part of a State which was a member of it. 2. That it would be improper to allow 'nine' States to receive a new member, because the same reasons which rendered that number proper now, would render a greater one proper, when the number composing the Union should be increased. They therefore

struck out this paragraph, and inserted a proviso, that 'the consent of so many States, in Congress, shall be first obtained, as may, at the time, be competent;' thus leaving the question, whether the 11th Article applies to the admission of new States to be decided when that admission shall be asked. See the Journal of Congress of April 20, 1784. Another doubt was started in this debate, namely: Whether the agreement of the nine States, required by the Confederation, was to be made by their legislatures, or by their delegates in Congress? The expression adopted, namely: 'So many States, in Congress, is first obtained,' shows what was their sense of this matter. If it be agreed that the 11th Article of the Confederation is not to be applied to the admission of these new States, then it is contended that their admission comes within the 13th Article, which forbids 'any alteration, unless agreed to in a Congress of the United States, and afterwards confirmed by the legislatures of every State.' The independence of the new States of Kentucky and Franklin, [Tennessee,] will soon bring on the ultimate decision of all these questions." — (Jefferson's Works, vol. 9, p. 251, 252.)

No date is affixed to the paper from which the above extract is taken; but it would seem from the final remark respecting Kentucky and Tennessee, that it must have been written shortly before the calling of the Convention which framed the Constitution, or before Mr. Jefferson, who was then in France, had heard that such a Convention was contemplated.